

A NV ALLIANCE SDN BHD
v.
KETUA PENGARAH HASIL DALAM NEGERI

B COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
HISHAMUDIN MOHD YUNUS JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-01-149-2010]
C 4 NOVEMBER 2011

REVENUE LAW: *Income tax - Deduction - Cash incentive payments - Payments made to appellant's employees upon achieving sales target - Whether payments deductible under Income Tax Act 1967 - Claim for -*
D *Whether payments are not 'hospitality' expenses and hence not 'entertainment' expenses - Income Tax Act 1967, ss. 18, 33(1) & 39(1)(l)*

STATUTORY INTERPRETATION: *Canons of construction - Income tax - Noscitur a sociis - Whether cash incentive payments comes within the meaning of 'or hospitality of any kind' - Whether preceding words to be taken into account - Income Tax Act 1967, s. 18*
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STATUTORY INTERPRETATION: *Canons of construction - Income tax - Ejusdem generis rule - Whether cash incentive expenses comes within the meaning of 'or hospitality of any kind' - Whether words restricted to same genus - Income Tax Act 1967, s. 18*
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The appellant was in the business of marketing burial plots, urn compartments and funeral packages. In the course of its business,
G the appellant appointed agents to undertake its marketing functions. Incentive schemes were introduced wherein, the agents, upon achieving certain set of sales target, were paid with various types of incentives and one of it was cash incentive. *Vide* s. 33(1) of the Income Tax Act 1967 ('Act'), the appellant in its tax
H returns claimed deductions from its gross income expenses that it paid out to its employees as cash incentives under the said incentive schemes. However, the respondent refused to allow the deductions on the ground that such cash incentive expenses were 'entertainment' expenses and as such, the deductions were not
I allowed by s. 39(1)(l) of the Act as it stood then (*ie*, before the

coming into force of the amendment to the provision *via* the Finance Act 2003). Pursuant to s. 99 of the Act, the appellant appealed to the Special Commissioners of Income Tax ('Special Commissioners') wherein it was decided that the cash incentive payments did qualify for deductions, being expenses wholly and exclusively incurred by the appellant in the production of its gross income from a source. Dissatisfied with the decision of the Special Commissioners, the respondent appealed to the High Court wherein their appeal was allowed. Hence this appeal by the appellant. The respondent contended that the cash incentives were expenses for 'hospitality' and thus, it was 'entertainment' expenses under s. 39(1)(l) of the Act. As such, the issue that arose for consideration herein was whether payment of cash incentives were 'entertainment' expenses and hence, came within the ambit of s. 39(1)(l) of the Act.

Held (allowing the appeal with costs; setting aside decision of High Court)

Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

- (1) The word 'entertainment' is defined under s. 18 of the Act which includes, *inter alia*, 'the provision of food, drink, recreation or hospitality of any kind'. The word 'hospitality' is not defined under the Act. (paras 8 & 9)
- (2) Applying the *noscitur a sociis* rule of statutory interpretation, the meaning of the more general words 'or hospitality of any kind' must be restricted to a sense analogous to that of the less general words, namely 'food, drink, recreation'. Thus, to determine whether or not the cash incentive expenses came within the meaning of 'or hospitality of any kind', the court took into account the words preceding that word, *ie*, 'food, drink, recreation'. If the meaning to be given to the words 'or hospitality of any kind' is limited accordingly, then, the cash incentives expenses clearly could not come within the meaning of those words.
- (3) Based on the *ejusdem generis* rule of statutory interpretation, the meaning to be given to the general words 'or hospitality of any kind' must be restricted to the same genus as 'food, drink, recreation'. If the meaning to the expression 'or hospitality of any kind' is so confined, thus, it would exclude payments of cash incentive.

- A (4) The cash incentive payments were not ‘hospitality’ expenses and hence, were not ‘entertainment’ expenses. As such, the cash incentive payments did not come under s. 39(1)(l) of the Act. Thus, the appellant was entitled to the deductions claimed in respect of the cash incentive payments. (para 15)

B ***Bahasa Malaysia Translation of Headnotes***

- C Perayu menjalankan perniagaan dalam pemasaran tapak perkuburan, petak bekas menyimpan abu mayat dan pakej pengebumian. Dalam menjalankan perniagaan tersebut, perayu telah melantik agen-agen untuk mengusahakan tugas-tugas pemasarannya. Skima-skima insentif telah diperkenalkan di mana, agen-agen, setelah mencapai suatu set target penjualan, telah dibayar dengan pelbagai jenis insentif-insentif dan salah satu daripadanya adalah insentif tunai. Melalui s. 33(1) Akta Cukai Pendapatan 1967 (‘Akta’), perayu telah di dalam taksiran cukainya memohon potongan daripada perbelanjaan pendapatan kasarnya yang telah dibayar kepada pekerja-pekerjanya sebagai insentif tunai di bawah skima insentif tersebut. Walau bagaimanapun, responden tidak membenarkan potongan atas alasan bahawa perbelanjaan insentif wang tunai sebegitu adalah perbelanjaan ‘entertainment’ dan oleh itu, potongan tidak dibenarkan oleh s. 39(1)(l) Akta (iaitu, sebelum pindaan kepada peruntukan dikuatkuasakan melalui Akta Kewangan 2003). Mengikut s. 99 Akta, perayu telah merayu kepada Pesuruhjaya Khas Cukai Pendapatan (‘Pesuruhjaya Khas’)
- D di mana ianya telah diputuskan bahawa bayaran insentif tunai layak untuk dipotong, memandangkan ianya merupakan perbelanjaan yang telah diperolehi oleh perayu dalam pengeluaran pendapatan kasarnya daripada suatu sumber. Tidak puas hati dengan keputusan Pesuruhjaya Khas, responden telah merayu ke
- E Mahkamah Tinggi di mana rayuannya telah dibenarkan. Oleh itu rayuan ini oleh perayu. Responden telah berhujah bahawa insentif-insentif tunai adalah perbelanjaan untuk ‘hospitality’ dan oleh itu, ianya adalah perbelanjaan ‘entertainment’ di bawah s. 39(1)(l) Akta. Maka, isu yang bangkit untuk pertimbangan di sini adalah sama ada bayaran insentif-insentif tunai merupakan perbelanjaan ‘entertainment’ dan oleh itu, ianya termasuk dalam lingkungan s. 39(1)(l) Akta.

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**Diputuskan (membenarkan rayuan dengan kos; A
mengeneipkan keputusan Mahkamah Tinggi)
Oleh Hishamudin Mohd Yunus HMR menyampaikan
penghakiman mahkamah:**

- (1) Perkataan 'entertainment' ditakrifkan di bawah s. 18 Akta yang merangkumi, antara lain, 'the provision of food, drink, recreation or hospitality of any kind'. Perkataan 'hospitality' tidak ditakrifkan di bawah Akta. B
- (2) Menggunakan peraturan tafsiran statutori *noscitur a sociis*, maksud perkataan-perkataan yang lebih umum 'or hospitality of any kind' mestilah dihadkan dari segi menyamai dengan perkataan-perkataan yang kurang umum, yakni, 'food, drink, recreation'. Oleh itu, untuk menentukan sama ada perbelanjaan insentif wang tunai jatuh di bawah maksud 'or hospitality of any kind', mahkamah telah mengambil kira perkataan-perkataan yang mendahului perkataan tersebut, iaitu, 'food, drink, recreation'. Jika maksud untuk diberikan kepada perkataan-perkataan 'or hospitality of any kind' adalah terhad, maka, perbelanjaan insentif-insentif tunai jelas tidak boleh jatuh di bawah maksud perkataan-perkataan tersebut. C
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- (3) Berdasarkan peraturan tafsiran statutori *ejusdem generis*, maksud untuk diberikan kepada perkataan-perkataan umum 'or hospitality of any kind' mesti dihadkan kepada jenisnya yang sama seperti 'food, drink, recreation'. Jika maksud kepada ungkapan 'or hospitality of any kind' dibataskan, maka, ianya akan mengecualikan bayaran untuk insentif tunai. F
- (4) Bayaran insentif tunai tidak merupakan perbelanjaan 'hospitality' dan oleh itu, bukanlah perbelanjaan 'entertainment'. Justeru, bayaran insentif tunai tidak jatuh di bawah s. 39(1)(l) Akta. Oleh itu, perayu layak kepada potongan yang dipohon berhubungan bayaran insentif tunai. G

Legislation referred to:

Income Tax Act 1967, ss. 33(1), 39(1)(l), 99

Other source(s) referred to:

Maxwell, *The Interpretation of Statutes*, 12th edn, p 289

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- A *For the appellant - Dato' WSW Davidson (Francis Tan Leh Kiah & Cheh Keng Soon with him); M/s Azman Davidson & Co*
For the respondent - Neng Juliana Ismail SFC

[Appeal from High Court, Kuala Lumpur; Civil Suit No: R1-14-04-2009]

- B *[Editor's note: For the High Court judgment, please see Ketua Pengarah Hasil Dalam Negeri v. NV Alliance Sdn Bhd [2010] 1 LNS 445.]*

Reported by Kumitha Abdul Majid

C

JUDGMENT

Hishamudin Mohd Yunus JCA:

- D [1] This is an appeal by the appellant company (NV Alliance Sdn Bhd) against the decision of the High Court of Kuala Lumpur (appellate and special powers division) of 22 February 2010. At the High Court the learned High Court judge had allowed the respondent's (the Director General of Inland Revenue) appeal against the decision of the Special Commissioners of Income Tax ('the Special Commissioners') who had, on appeal by appellant to them pursuant to s. 99 of the Income Tax Act 1967 ('the Act'), against the tax assessment of the appellant by the respondent, allowed the appellant's appeal.

- F [2] We, unanimously, are allowing the appeal with costs. Our grounds are as follows.

[3] We begin by setting out briefly the facts.

- G [4] The appellant is in the business of marketing of burial plots, urn compartments and funeral packages. In the course of its business, the appellant needs the services of marketing personnel; and so it appoints agents to undertake the marketing functions. The agents are paid commissions for their work. But with the aim of motivating agents to increase sales, the appellant introduced incentive schemes. Under the incentive schemes, the agents on achieving certain set sales targets are paid various types of incentives. One type of incentive is cash incentive.

- H [5] The appellant in its tax returns had claimed deductions from its gross income expenses that it paid out to its employees as cash incentives under the incentive schemes. This claim for deductions is made pursuant to sub-s. (1) of s. 33 of the Act. This subsection provides:

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33. Adjusted income generally

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- (1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source.

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[6] It is common ground in this appeal and it is also the finding of the Special Commissioners that the cash incentive payments – the subject matter of this appeal – *prima facie*, do qualify for deductions by virtue of the above provision, being expenses wholly and exclusively incurred by the appellant in the production of its gross income from a source.

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[7] However, notwithstanding this, the Director General of Inland Revenue ('the Director General') still refuses to allow the deductions on the ground that such cash incentive expenses are 'entertainment' expenses; as such, the deductions are not allowed by item (l) of sub-s. (1) of s. 39 of the Act. Section 39(1)(l) as it stood then (ie, before the coming into force of the amendment to the provision *via* the Finance Act 2003 (Act 631)) reads:

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Deductions not allowed

(39) (1) Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of:

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(a) - (k) [not applicable]

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- (l) any expenses incurred in the provision of entertainment including any sums paid to an employee of that person for the purpose of defraying expenses incurred by that employee in the provision of entertainment:

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[8] In s. 18 of the Act, 'entertainment' is defined as:

'entertainment' includes:

- (a) the provision of food, drink, recreation or hospitality of any kind; or

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A (b) the provision of accommodation or travel in connection with
or for the purpose of facilitating entertainment of the kind
mentioned in para. (a),

by a person or an employee of his in connection with a trade or
business carried on by that person.

B [9] There is no definition of the word ‘hospitality’ in the Act.

C [10] The present appeal concerns only the payment of cash
incentives; whether such payments are entertainment expenses and
hence come within the ambit of item (l) of sub-s. (1) of s. 39 of
the Act.

D [11] The respondent/Director General takes the position that the
cash incentives, as paid by the appellant to its employees, are
expenses for ‘hospitality’ and are, therefore, entertainment
expenses; and, therefore, item (l) of sub-s. (1) of s. 39 of the Act
applies.

E [12] At the hearing before them, the Special Commissioners
found the facts which are set out in the case stated at para. 6
and allowed the appellant’s appeal. In allowing the appeal, they
gave their grounds of decision as follows:

F Now, the question before us is whether all the expenses incurred
by the appellant are in a form of entertainment within the meaning
of section 18 of the Act. Therefore we have to examine what is
the true nature of expenses based on the evidence and documents
adduced before us.

G According to Mr. Soo Wei Chian (AW1), an executive director
of the appellant, all the expenses were made to the agents who
achieve the next targets as set out in the respective notices to
them. The incentives are in the nature of additional remuneration
paid to agents who met the sales target. The AW1 further
explained that the reason for introducing the incentives is to
motivate agents to work harder to increase the sales of the
appellant.

H According to Mr. Yap Hoi Chong (AW2) who work as an agent
of the appellant, his income is in a form of commission based on
his performance. Besides commission, he was also paid some
incentives such as sales target incentives, agency sales
competition incentives, quarterly incentives and cash incentives if
I he achieves certain target.

Based on the facts of the case, we are of the view that the expenses incurred are solely with the object of promoting the business. In other words the incentive is to motivate agents to work harder to increase the sales of the appellant as stated by AW1 and AW2. Therefore we are of the opinion that the expenses are [related to] the performance of profit earning operations would be of a revenue nature. We cannot agree with the respondent that the expenses are constitute as an entertainment within the meaning of section 18 of the Act; and therefore not allowable as deduction in the ascertaining of adjusted income pursuant to section 39(1)(l) of the Act.

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In view of the above facts, we are of the opinion that the expenses in this appeal were wholly and exclusively incurred in the production of the appellant's gross income pursuant to section 33(1) of the Act and not prohibited from deduction by virtue of section 39(1)(l) of the Act before its amendment by Act 631 of 2003.

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[13] The Special Commissioners then made the following deciding order:

ADALAH DIPUTUSKAN bahawa perbelanjaan berikut:

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Perbelanjaan	T/T/2000 (STTS)(RM)	T/T/2001 (RM)	T/T/2002 (RM)
Sales target incentives	238,948	87,993	127,295
Agency sales competition	180,000	103,710	-
Quarterly incentives	540,979	-	-
Cash incentives to agents	306,154	-	-

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adalah dibenarkan sebagai tolakan di bawah seksyen 33(1) Akta Cukai Pendapatan 1967; dan penalti di bawah seksyen 113(2) Akta yang sama adalah tidak patut dikenakan dalam kes ini.

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MAKA DENGAN INI ADALAH DIPERINTAHKAN bahawa rayuan ini dibenarkan.

DAN DIPERINTAHKAN SELANJUTNYA bahawa Notis-notis Taksiran bagi Tahun-tahun Taksiran 2000 (STTS), 2001 dan 2002 yang berkaitan dengan rayuan ini dipinda sejajar dengan keputusan di atas.

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A [14] The respondent/Director General, dissatisfied with the
decision of the Special Commissioners, appeal to the appellate and
Special Powers Division of the High Court of Kuala Lumpur. The
High Court allowed the appeal and reversed the Order of the
Special Commissioners. The learned High Court judge, in her
B judgment, ruled that the cash incentives are ‘entertainment’
expenses and are, therefore, disallowed to be deducted by item (l)
of sub-s. (1) of s. 39 of the Act. She said:

C 24. In order to determine whether the ‘incentives’ come within
the meaning ‘entertainment’ under section 18 of the Act, I
refer to part of the judgment of Romer LJ in *Bentleys, Stokes
& Lawless v. Beeson (Inspector of Taxes)* cited in the case of
Aspac Lubricants (Malaysia) Sdn Bhd v. KPHDN (supra) as
follows:

D ... that the purpose must be the sole purpose ... If
the activity be undertaken with the object of both
promoting business and also with some other purpose
... then the paragraph is not satisfied though in the
mind of the actor the business motive may predominate

E ...
In the present case the incentives are paid through
competitions or contests organized by the Respondent where
there are rules and regulations, there are specified closing
dates, winners will be announced and determined by the
Respondent and top prizes and consolation prizes are given
F to winners. The incentives are paid as a reward for those
sales agents who achieve the sales targets. Therefore apart
from the commissions that the Respondent is contractually
bound to pay under the agency agreements, the sales agents
are rewarded for achieving sales targets. It is therefore
G apparent that the payment of incentives, though with the
predominant purpose of promoting the Respondent’s
business, was also given or paid to reward those sales
agents who achieve the sales targets set. Therefore the
incentives were not paid solely for the purpose of promoting
H the Respondent’s business.

I 25. Further the Respondent does not include these incentives in
the income statement of each sales agent. This indicates that
the incentives were not part of the contractual commissions
paid under the agency agreements. I agree with the appellant
that these incentives are extra payments given to the sales
agents over and above the commissions that they are paid
for doing what they are contractually bound to do under the

agency agreements. The agents are not required to fork out anything extra. Thus the incentive payments given by the Respondent are by nature gratuitous without consideration. I find that there is the element of hospitality in the incentives given based on the case of *United Detergent Industries Sdn Bhd v. Director General of Inland Revenue (supra)* cited by the Appellant where the Court said:

... the word “hospitality” connotes the action of entertaining someone without that someone having so subscribe towards the cost incurred by the host for the purpose of entertaining that someone.

Section 18 of the Act defines ‘entertainment’ to include “hospitality of any kind”. Having considered the facts I find that the SCIT has erred when it concluded that the incentives do not come within the meaning of ‘entertainment’.

[15] With respect, on our part, we are unable to agree with the decision and reasoning of the learned High Court judge. In our judgment, the cash incentive payments are not ‘hospitality’ expenses, and, hence, are not entertainment expenses. In other words, the cash incentive payments do not come under item (1) of sub-s. (1) of s. 39 of the Act. It follows then that the appellant is entitled to the deductions claimed in respect of the cash incentive payments. We are in agreement with the submission of the learned counsel for the appellant that this is a case where the *noscitur a sociis* rule of statutory interpretation is applicable. According to this rule of interpretation, where two or more words which are susceptible of analogous meaning are coupled together in a statutory provision, they are understood to be used in their cognate sense. They take as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general (*Maxwell on The Interpretation of Statutes*, 12th edn, p. 289). It follows then that in the present case the meaning of the more general words ‘or hospitality of any kind’ must be restricted to a sense analogous to that of the less general words, namely, ‘food, drink, recreation’. In other words, in determining as to whether or not the cash incentive expenses come within the meaning of ‘or hospitality of any kind’, we have to take into account the words preceding that word, that is to say, the words ‘food, drink, recreation’. In our view, if the meaning to be given to the words ‘or hospitality of any kind’ is limited accordingly, then, the cash incentives expenses clearly cannot come within the meaning of these words (‘or hospitality of any kind’).

- A [16] Alternatively, we would arrive at the same finding if we were to apply the related *ejusdem generis* rule. According to this related rule of statutory interpretation, the meaning to be given to the general words ‘or hospitality of any kind’ must be restricted to the same *genus* as ‘food, drink, recreation’ (*Maxwell on The Interpretation of Statutes*, p. 297). In other words, the words ‘or hospitality of any kind’ must be given a meaning that is *ejusdem generis* with ‘food, drink, recreation’. If the meaning to the expression, ‘or hospitality of any kind’ is so confined, clearly, it would exclude the payments of cash incentive.
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- C [17] We, accordingly, set aside the order of the High Court and restore the deciding order of the Special Commissioners.

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